



- 4) What temporary total disability compensation should be awarded claimant, if any, and what credit, if any, should be given to respondent for the payments made by respondent?
- 5) Is claimant entitled to reimbursement of out-of-pocket expenses?
- 6) Is claimant entitled to future medical treatment for the injuries alleged?
- 7) Is claimant entitled to unauthorized medical expenses of up to \$500?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file, the Appeals Board makes the following findings of fact and conclusions of law:

#### **FINDINGS OF FACT**

The claimant, Rowena R. Goodwin, had worked as an assistant manager for 7-Eleven since 1985. Her job included doing paperwork, counting money, running the cash register, and scheduling work times for the other employees. Claimant usually worked 40 hours per week or more. The Administrative Law Judge found, in the Award, that, on the date of accident in August 1995, claimant was earning \$8.50 an hour plus benefits.

On August 28, 1995, while working in the cooler, claimant slipped on a wet spot and fell, striking her head on a stack of soft drinks, her hand on a metal shelf, and both knees on the concrete floor. Claimant was referred to Dr. Jobe and was taken off work. Eventually, she was referred to Dr. Greg Bliss, a board-eligible orthopedic surgeon, who performed surgery on claimant's right knee. Claimant was paid temporary total disability compensation and returned to full duty December 18, 1995.

In March 1996, claimant went to Dr. Mallouk on her own referral with severe leg, back and knee pain. She was provided medication, and medical treatment, including physical therapy, but continued working. On May 12, 1996, while bending over to pick up a pack of cigarettes, claimant felt a pop in her back, accompanied by sudden, severe back pain. Claimant was referred to Dr. Mallouk and eventually referred to Dr. H. C. Palmer at Occupational Health Services in Lenexa, Kansas. Dr. Palmer found no evidence of significant injury, but ordered a functional capacity evaluation. After the functional capacity evaluation, Dr. Palmer concluded the claimant was able to return to her regular job.

Dr. Palmer read the functional capacity evaluation as indicating claimant was attempting to manipulate the test by not giving maximum effort. Claimant was released to

full duty on June 27, 1996. Dr. Palmer noted in his medical report that claimant was not complying with the recommended treatment as she did not attend all of her physical therapy. He felt claimant had sustained no permanent impairment as a result of the back injury.

On August 9, 1996, while working the night shift, claimant experienced a sudden pain in her side while lifting boxes. Claimant was referred to Dr. Gregory Henry at Occupational Health Services, who then referred her to Dr. Thomas Taylor, a board-certified general surgeon, who diagnosed an incisional hernia. The hernia was located over the site of a previous hernia suffered by claimant and, in fact, actually occurred in the incision line from the old nonwork-related abdominal surgery. Dr. Taylor felt that the hernia was attributable to the fact that claimant had had a previous surgery at that site, causing it to be weakened, and to the fact that claimant was morbidly obese, standing 5'6" tall and weighing 307 pounds. Dr. Taylor felt that, while claimant was a candidate for surgery, he did not consider her to be an optimum candidate as she was substantially overweight. He recommended she lose weight and clear up a dermatitis condition on her abdomen before he would consider surgery to repair the hernia. Claimant applied for long-term disability through the company, and at the time of the regular hearing continued on this long-term plan. She had also qualified under Social Security disability and began receiving benefits in March 1997. Claimant admitted that she suffered from diabetes and high blood pressure. And she was morbidly obese. Claimant was also on medication for the arthritis in her bilateral feet and ankles, and advised the doctors in the spring of 1995, while in the hospital, that she expected to be in a wheelchair soon due to her ongoing degenerative arthritis condition.

Claimant was examined by Dr. P. Brent Koprivica in March 1997, at the request of her attorney.

After examining claimant and reviewing medical reports, Dr. Koprivica opined that claimant had suffered a 43 percent loss of functional impairment to the right lower extremity, and a 37 percent impairment of the left knee due to the loss of motion and degenerative changes, which combined to a 36 percent impairment to the body as a whole. He felt that claimant suffered no additional impairment as a result of the May 1996 cigarette-lifting incident, but did assess a 20 percent whole person impairment for the August 1996 hernia. He stated claimant was incapable of any substantial and gainful employment, and attributed claimant's limitations primarily to the August 1995 injury.

Dr. Koprivica acknowledged that claimant did not appear to have given maximum effort during the functional capacity evaluation, and agreed the hernia surgery would not be advisable at this time due to claimant's current physical condition. He also acknowledged a 1989 report showing a 20 percent impairment to claimant's knee.

Respondent took the deposition of Dr. H. C. Palmer in November 1997. Dr. Palmer was an employee of Occupational Health Services and specialized in sports medicine. He

examined claimant after the May 1996 incident and found no objective evidence of any significant injury. He discovered that claimant was using a walker which he had not prescribed. Claimant acknowledged the walker was her mother's.

Dr. Palmer attempted to treat claimant for her back complaints after the May 1996 incident, but was unable to do so because he felt she was trying to manipulate the testing. He found positive Waddell's signs indicating symptom magnification.

Respondent also deposed Dr. Thomas Taylor, the general surgeon asked to examine claimant's hernia. He described an incisional hernia over the site of the previous abdominal surgery. He felt that part of claimant's problem was attributable to the fact that her abdominal wall had been previously opened, and part to her morbid obesity. He did, however, acknowledge that the repetitive lifting claimant was doing at work probably made claimant's hernia larger. While he agreed claimant would be a candidate for surgery if she lost weight and cleared up the dermatitis, he was unwilling to undertake the procedure at the time of his examination.

Dr. Greg Bliss, a board-eligible orthopedic surgeon, was deposed on November 11, 1997. He had the opportunity to examine claimant in 1995. After examining claimant subsequent to the August 1995 fall, Dr. Bliss returned claimant to her regular work as tolerated. He did indicate claimant was limited in her ability to walk without stopping to rest. This he primarily attributed to her chronic arthritis, and not the right knee injury. He rated claimant at 12 percent to the body as a whole for the right knee injury. He provided no rating for any other part of claimant's body. He returned claimant to work with respondent in November 1995, but temporarily restricted her to half days and limited her activities. It does not appear from the record that claimant was able to follow those restrictions.

During Dr. Gregory Hummel's deposition, taken November 12, 1997, he testified that claimant was requesting to be found medically disabled from work as early as April 4, 1995. He noted claimant displayed a substantial list of physical complaints, including hiatal hernias, pelvic lipomatosis, stomach ulcers, appendix and bladder problems, collapsed colon, thyroid problems, a hemorrhoidectomy, an earlier hernia operation in 1989, pregnancy complications, a history of degenerative arthritis, broken left ankles in 1968 and 1993, and ongoing and active diabetes.

He returned claimant to work that would not require extensive standing or walking, primarily due to the degenerative arthritis in her ankle, her weight, and her diabetes.

Respondent also deposed Darren Kobel, the store manager of the store on Quivira Road in Kansas City. Claimant was the lead sales associate under Mr. Kobel at that time. He acknowledged claimant worked 40 hours a week, with occasional overtime, but does not recall any 12- to 16-hour days during the period of time alleged by claimant. He was aware claimant suffered the various injuries described.

As a result of the dispute between the medical experts, claimant was ordered to be examined by Dr. Steven L. Hendler. His court-ordered independent medical examination occurred on July 7, 1997. Dr. Hendler found claimant to suffer from hernias, myofascial pain syndrome, post meniscectomy by arthroscopy, ACL tear of the right knee, diabetes mellitus, hypertension and a past hysterectomy. He felt claimant suffered a total impairment of 28 percent to the body as a whole, based upon the AMA Guides to the Evaluation of Permanent Impairment. This included 8 percent to the abdominal wall, 10 percent to the right knee, 1 percent for the meniscectomy, 4 percent to the left knee, and 5 percent for a lumbar soft tissue lesion.

The Administrative Law Judge, in reviewing the totality of the medical evidence, found claimant to be permanently and totally disabled from any type of substantial gainful employment, and awarded her a permanent total disability.

#### CONCLUSIONS OF LAW

In proceedings under the Workers Compensation Act, the burden of proof shall be on claimant to establish claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g). It is the function of the trier of facts to decide which testimony is more accurate and/or credible, and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of a disability. The trier of facts is not bound by medical evidence presented in the case, but has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

Claimant suffered a substantial injury in August 1995 when she slipped and fell, striking her head, hand and knees. Claimant received medical treatment, including surgery to the right knee, and was eventually returned to work with respondent at her regular job. While claimant was provided restrictions upon her return to work, it does not appear as though those restrictions were maintained by the claimant or respondent. The Administrative Law Judge, in reviewing the evidence, found claimant to have suffered a 30 percent permanent partial impairment of function to the body as a whole resulting from that injury. The Appeals Board, in considering the evidence, finds this Award to be appropriate, and affirms same.

Claimant then suffered a second accident on May 12, 1996, while bending over to pick up cigarettes. While claimant alleges a substantial injury from that situation, the medical evidence does not support claimant's contentions. Even Dr. Koprivica, claimant's hired expert, was unable to attribute any permanency to claimant's May 12, 1996, accident. Therefore, the Administrative Law Judge's denial of any permanency for this injury is affirmed. However, claimant was off work until June 27, 1996, and is entitled to medical treatment, and temporary total disability for 6.43 weeks from this accident based on an average weekly wage of \$367.98.

Finally, the Appeals Board must consider the August 9, 1996, accident, at which time claimant suffered a reoccurring hernia at the incision site of her previous hernia surgery.

K.S.A. 1996 Supp. 44-510d(a)(22) defines the benefits which may be awarded for a hernia:

For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510 and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during 12 weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for repair of such hernia shall deprive such employee of any benefits under the workers compensation act.

Dr. Taylor made it clear that claimant's hernia was inoperable until such time as claimant lost weight and gained control of the dermatitis condition on her abdomen. Therefore, claimant is limited to a maximum of 12 weeks permanent partial disability compensation for this hernia.

A permanent total disability award does not appear appropriate in this instance.

Under both the August 1995 and May 1996 accidents, claimant would possibly be entitled to work disability had she not returned to work for her employer at a comparable wage and suffered a new and distinct injury. K.S.A. 44-510e(a) allows for a permanent partial disability based upon a claimant's loss of ability to perform work tasks that the employee performed over the previous fifteen years, as well as an averaging of the difference between claimant's average weekly wage being earned at the time of the injury and the average weekly wage being earned after the injury. However, K.S.A. 44-510e(a) goes on to state:

An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

In this instance, after the 1995 injury, claimant did return to work for respondent, performing her regular duties at a wage comparable to that being earned at the time of the injury. The medical evidence does not support a finding of any permanency for the 1996 incident, and claimant continued to earn a comparable wage after that incident.

Claimant's removal from her employment and her inability to perform the job stem from the August 1996 hernia incident which, statutorily, limits claimant to a scheduled injury under K.S.A. 1996 Supp. 44-510d. Therefore, with regard to the award of permanent total disability compensation, the Award of the Administrative Law Judge is reversed, and claimant is awarded 12 weeks permanent partial disability compensation for the August 9, 1996, accident, and the medical associated with claimant's hernia treatment.

The Administrative Law Judge found claimant's average weekly wage to be \$367.98 for the injury occurring on August 28, 1995, and \$373.44 for the injury occurring on August 9, 1996. These findings are supported by the evidence, and are affirmed by the Appeals Board.

The medical expenses and mileage referred to in Claimant's Exhibit 1 on page 5, which are unpaid or unreimbursed, are ordered paid by respondent. Mileage trips to Dr. Mallouk are considered as unauthorized medical, and shall be awarded up to \$500 under the unauthorized medical statute.

Claimant is entitled to future medical treatment for both the August 1995 and August 1996 injuries, upon application to and approval by the Director of Workers Compensation.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler dated March 11, 1998, should be, and is hereby, modified, and claimant, Rowena R. Goodwin, is granted an award against the respondent, Southland Corporation, D/B/A 7-Eleven, and its insurance carrier, American Protection Insurance Company, for injuries suffered on August 28, 1995, May 12, 1996, and August 9, 1996.

Claimant is entitled to 15.86 weeks temporary total disability at the rate of \$245.33 per week totaling \$3,890.93, followed by 124.24 weeks permanent partial disability compensation at the rate of \$245.33 per week totaling \$30,479.80 for a 30 percent permanent partial general disability, for a total award of \$34,370.73 which is ordered paid in one lump sum minus any amounts previously paid for the August 28, 1995, injury.

Claimant is further awarded 6.43 weeks temporary total disability at the rate of \$245.33 per week in the amount of \$1,577.47, which is all due and owing at the time of this Award and ordered paid in one lump sum minus amounts previously paid, plus medical treatment for the authorized medical care from the May 12, 1996, injury to her back, but permanent disability is denied for that injury.

Claimant is further awarded 12 weeks permanent partial disability compensation at the rate of \$248.97 per week totaling \$2,987.64, all of which is due and owing at the time

of this Award, and ordered paid in one lump sum minus any amounts previously paid for the accident on August 9, 1996.

Any unpaid medical expenses listed in Claimant's Exhibit 1 are ordered paid by respondent.

Future medical treatment may be awarded upon proper application to and approval by the Director of Workers Compensation.

Unauthorized medical expenses of up to \$500 are awarded to claimant upon presentation of itemized statements verifying same.

The costs and fees associated with the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier as follows:

Jay E. Suddreth & Associates, Inc.	\$1,701.10
Metropolitan Court Reporters, Inc.	\$ 526.50

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January 1999.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Terri Z. Austenfeld, Overland Park, KS  
Denise E. Tomasic, Kansas City, KS  
Robert H. Foerschler, Administrative Law Judge  
Philip S. Harness, Director